PD-0617-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/4/2021 11:58 PM
Accepted 1/5/2021 9:21 AM
DEANA WILLIAMSON
CLERK

NO. PD-0617-20

FILED
COURT OF CRIMINAL APPEALS
1/5/2021
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

THE STATE OF TEXAS,
Appellant

vs.

EDMUND KOKO KAHOOKELE,
Appellee

APPELLEE'S BRIEF

Third Court of Appeals No. 03-18-00399-CR
From the 207th District Court of Comal County
Honorable Gary Steel, Presiding
Trial Court Cause No. CR2017-356

ORAL ARGUMENT NOT REQUESTED

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Trial Court	274th District Court Comal County, TX Honorable Gary Steel, Presiding

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Edmund Kahookele, Appellee in the cause below and files his brief on discretionary review.

STATEMENT OF THE CASE

Edmund Koko Kahookele was charged by indictment with one count of possessing less than a gram of cocaine and one count of possessing less than a gram of methamphetamine, both state jail felonies. (CR 15-16)[1] *See* TEX. HEALTH & SAFETY CODE §481.115(b). State jail felonies are typically punishable by confinement of 180 days to two years in a state jail facility. TEX. PENAL CODE §12.35(a).[2]

In this case, however, the indictment contained three "enhancement" paragraphs. The first paragraph, entitled "§12.35(c) enhancement paragraph" alleged that on March 12, 1990, Appellee had been convicted of murder, an offense listed in (former) Article 42.12 § 3(g)(a)(1)[3]. With this prior conviction, the State sought to enhance the charges to "aggravated" state jail felonies, punishable

[1] "CR" refers to clerk's record; "RR" refers to reporter's record.
[2] All numbered sections refer to TEX. PENAL CODE (LexisNexis, Lexis Advance through the most recent legislation which is the 2019 Regular Session, 86th Legislature, and the 2019 election results), unless otherwise identified.
[3] Now TEX. CODE CRIM. PROC. Art. 42A.054

as third-degree felonies under Section 12.35(c) of the Texas Penal Code.[4]

The next two paragraphs alleged that Appellee had been finally convicted of two sequential felony offenses, Forgery by Possession[5] on July 9, 1987 and Engaging in Organized Criminal Activity[6] on July 14, 2004. Within the heading of the indictment, the State outlined its intended enhancement progression: AGGRAVATED STATE JAIL FELONY ENHANCED TO HABITUAL OFFENDER (25 YEARS TO 99 YEARS OR LIFE), citing §481.115(b) [Health and Safety Code], §12.35(c)(2)(A) [Texas Penal Code] and §12.42(d) [Texas Penal Code]. (CR 15)

Appellee filed a "Motion to Quash the Indictment and Objections to the Enhancement Allegations," arguing that Section 12.425, *Penalties for Repeat and Habitual Felony Offenders on trial for State Jail Felony* is the exclusive means for enhancing state jail

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[4] Other "aggravating factors" under §12.35(c) include use of a deadly weapon in the instant offense; prior convictions under 20A.03 or 21.02; or a previous felony conviction containing a deadly weapon affirmative finding.
[5] §32.31
[6] §71.02

felonies.[7] (CR 62-64) The trial court granted the motion to quash. (CR 93)

The State appealed the trial court's order. (CR 98-102) In a published opinion, the Third Court of Appeals reversed the trial court's ruling and remanded the case. *State v. Kahookele*, 03-18-00399-CR; 2020 WL 3054656 (Tex. App.—Austin, delivered June 9, 2020). Justice Kelly concurred in part and dissented in part, agreeing that there was no ex post facto violation in the use of Appellee's 1990 murder conviction to elevate the instant offense to an "aggravated" state jail felony. *Kahookele*, 2020 WL 30546556, Kelly, J., dissenting in part, at 1. However, she disagreed with the Court's holding that state jail felonies remain subject to the habitual enhancement scheme contained in 12.42 TEX. PENAL CODE . *Id*. No motion for rehearing was filed, but this singular issue formed the ground for Appellee's Petition for Discretionary Review, which was granted by this Court.

[7] He also argued that the use of his 1990 murder conviction as a "3g" offense to elevate the punishment of the state jail felony to that of a third-degree felony under TEX. PENAL CODE 12.35(c) violated the prohibition on ex post facto laws. The trial court did not note the basis of his ruling.

STATEMENT REGARDING ORAL ARGUMENT

Appellee did not request, nor did this Court order oral argument in this case.

GROUND FOR REVIEW

Whether the Court of Appeals erred in holding that aggravated state jail felonies [TEX. PENAL CODE, Section 12.35(c)] are subject to further enhancement under the repeat and habitual-offender statute governing first, second-, or third-degree felonies [TEX. PENAL CODE 12.42(d)], rather than Section 12.425, *Penalties for Repeat and Habitual Felony Offenders on Trial for State Jail Felony.*

SUMMARY OF ARGUMENT

The punishment enhancement statutes applying to state jail felonies punished under TEX. PENAL CODE §12.35(c) are ambiguous, particularly in light of the 2011 enactment of TEX. PENAL CODE §12.425: *Penalties for Repeat and Habitual Offenders on Trial for State Jail Felony*. This most recent revision separates state jail felony punishment enhancements from those of first-, second- and third-degree offenses; thus, Appellee argues that "aggravated" [§12.35(c)] state jail felonies, are not subject to the habitual enhancement provisions of TEX. PENAL CODE §12.42(d).

A review of extra-textual factors, particularly the legislative history, reveals that the legislature has consistently drafted its revisions with a focus on protecting the lower-level felony status of state jail felonies, particularly non-aggravated state jail felonies under §12.35(a). Even aggravated state jail felonies are only punished as third-degree felonies, just one grade above a non-aggravated state jail felony. Throughout this history, the legislature has never indicated an intent to enhance state jail felony offenders

punished under §12.35(c) as harshly as those who commit higher level offenses.

ARGUMENT & AUTHORITIES

I. Background

There are two statutory provisions under which the State sought to enhance Appellee's sentence, §12.35(c) and §12.42(d) of the Texas Penal Code.

Appellee was indicted for possessing less than a gram of two different controlled substances, state jail felony-level offenses. (CR 15) *See* 481.115(b) TEX. HEALTH & SAFETY CODE. If convicted, the punishment for a state jail felony is governed by §12.35 of the Texas Penal Code.

> **Sec. 12.35. STATE JAIL FELONY PUNISHMENT**.
>
> (a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
>
> (b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.

(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or

(2) the individual has previously been finally convicted of any felony:

(A) under Section 20A.03 or 21.02 or listed in Article 42A.054(a), Code of Criminal Procedure; or

(B) for which the judgment contains an affirmative finding under Article 42A.054(c) or (d), Code of Criminal Procedure.

TEX. PENAL CODE §12.35

Included with the indictment in this case, in a paragraph entitled "12.35(c) enhancement," the State alleged that Appellee was convicted in 1990 of murder, an offense listed in TEX. CODE CRIM. PROC. 42.12§3(g)(a)(1) (now §42A.054(a)). (CR 15-16) Based on this alleged prior conviction, the State gave notice that it was seeking to convict Appellee of an "aggravated" state jail felony under §12.35(c)(2)(A). If proven, Appellee would face third degree felony

punishment—between two and ten years in prison. TEX. PENAL CODE §12.34.

The next paragraphs in the indictment alleged that Appellee had two additional, sequential felony convictions, one for Engaging in Organized Criminal Activity in 2004 (TEX. PENAL CODE §71.02), and the other for Forgery by Possession in 1987. (TEX. PENAL CODE §32.31) (CR 15-16) With the addition of these two prior convictions, the State sought a significant increase in Appellee's punishment exposure—from a range of two to ten years in prison to that of habitual offender, twenty-five to ninety-nine years, or life, in prison under authority of Texas Penal Code §12.42(d).

> **Sec. 12.42. PENALTIES FOR REPEAT AND HABITUAL FELONY OFFENDERS ON TRIAL FOR FIRST, SECOND, OR THIRD DEGREE FELONY.**
>
> (a) – (c) subsections omitted.
> (d) Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A

> previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection.
>
> TEX. PENAL CODE §12.42

Notably, in this state jail felony case, the section of the Penal Code governing "Penalties for Repeat and Habitual Felony Offenders on Trial for State Jail Felony," (§12.425) played no part in the sentencing roadmap advocated by the State and approved by the Court of Appeals.

> **Sec. 12.425. PENALTIES FOR REPEAT AND HABITUAL FELONY OFFENDERS ON TRIAL FOR STATE JAIL FELONY**.

Prior to September 1, 2011, §12.42 governed enhancement of all felonies, including state jail felonies. The 82nd Legislature removed all of the state jail felony enhancement provisions from §12.42 (including former subsection (3) which addressed enhancement of aggravated state jail felonies) and changed the title of that section to reflect that it governed non-state jail felonies: "Penalties for Repeat and Habitual Felony Offenders **on Trial for First, Second, or Third Degree Felony**." *See* Act of May 25, 2011, 82nd Leg., R.S., 834, § § 1, 2, 5, 2011 Tex. Gen. Laws 2104, 2014-05. (emphasis added to reflect the change in title).

The legislature simultaneously created a separate section for state jail felony enhancement provisions and placed the provisions it removed from §12.42, "nearly verbatim[8]," into the newly enacted §12.425, "Penalties for Repeat and Habitual Felony Offenders *on Trial for State Jail Felony*." *Id.* (emphasis added)

> (a) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two state jail felonies punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the third degree.
>
> (b) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies other than a state jail felony punishable under Section 12.35(a), and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a felony of the second degree.
>
> (c) If it is shown on the trial of a state jail felony for which punishment may be enhanced under Section 12.35(c) that the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the second degree.
>
> TEX. PENAL CODE §12.425

[8] *Kahookele, Slip. Op.*, Kelly, J. dissenting in part at 1.

Appellee contends that the legislature intended that we consult §12.425 to determine potential punishment enhancements for defendants charged with state jail felonies—whether under 12.35(a), or those for which punishment may be enhanced under 12.35(c). The Court of Appeals erred in finding otherwise.

II. Standard of Review of Rulings to Quash Indictments

An appellate court should review a trial judge's decision on a motion to quash an indictment de novo, particularly where, as here, the hearing at the trial court consisted only of argument and authorities. See *Smith v. State*, 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010) ; *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008) (citing *Moff v. State*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004**)**).

III. Determining the Meaning of a Statute

A court's interpretation of a statute must "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)(citing *Camacho v. State*, 765 S.W.2d 431 (Tex. Crim. App. 1989)). Courts must begin with the plain language of a statute in order to discern its meaning, and if the literal text is "clear and

unambiguous," courts must ordinarily give effect to that plain meaning. Id., citing *Smith v. State*, 789 S.W.2d 590, 592 (Tex. Crim. App. 1990)). Specific provisions are given more effect than the more general provisions. *Id*; TEX. GOV'T. CODE §311.026 .

However, if the language is ambiguous, or if the plain language would lead to absurd results, the court may consider extra-textual factors, such as legislative history, prior statutory provisions, prior caselaw, the object sought to be obtained and the consequences of a particular construction. *Id.* at 785-86, *citing Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004); TEX. GOV'T CODE § 311.023.

Statutory language is ambiguous if it is "reasonably susceptible to more than one understanding." *Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013). Put another way, the language of a statute is ambiguous if it "may be understood by reasonably well-informed persons in two or more different senses." *Oliva v. State*, 548 S.W.3d 518, 521 (Tex. Crim. App. 2018), *citing State v. Schunior*, 506 S.W.3d 29, 34-35 (Tex. Crim. App. 2016).

IV. Ambiguity

It must be presumed that the Legislature intended for the entire statutory scheme to be effective. *See* TEX. GOV'T CODE Ann.

§311.021(2) ; *Murray v. State*, 302 S.W.3d 874, 879, 881 (Tex. Crim. App. 2009) (in construing a statute, consider other provisions within entire "statutory scheme" rather than merely the single, discrete provision at issue). Thus, the provisions of sections 12.35, 12.42(d) and 12.425 must be construed, if possible, so that effect is given to all. TEX. GOV'T CODE Ann. §311.026(a); *Mancuso v. State*, 919 S.W.2d 86 (Tex. Crim. App. 1996). One need only look to the majority and dissenting opinions of the Court of Appeals in this case to see that there are at least two different, reasonable interpretations of the interplay of the statutes at issue. The dissent argued that considering the revisions in the context of the entire statutory scheme confirms that "we should look to section §12.425 —and no longer to Section 12.42 —for enhancements for state jail felonies, including aggravated ones." *Kahookele*, J. Kelly dissenting in part, p.1; *citing Baird*, 398 S.W.3d 220 , 228-29. "Why would the Legislature create new Section 12.425 for enhancements for state jail felonies; expressly transfer the enhancements for repeat and habitual state jail offenders to the new statute, including those 'for which punishment may be enhanced under Section 12.35(c),' but

silently retain in Section 12.42(d) an enhancement for habitual state jail felonies punishable under Section 12.35(c)?" *Id.* at 2.

Conversely, the majority held that the habitual offender language remaining in §12.42 , stating "if it is shown on the trial of a felony offense *other than a state jail felony punishable under Section 12.35(a),*" indicates the legislature's intent that state jail felonies punishable under 12.35(c) may still be enhanced under that section, and only those punishable under 12.35(a) are beyond the reach of §12.42. *Kahookele* at 17.

The majority opinion in this case cited its own opinion in *Bunton v. State* , where it stated:

> It is clear that the legislature could have exempted all state jail felonies from the habitual criminal status in section 12.42(d). The legislature, however, expressly exempted only those state jail felonies punishable under section 12.35(a), often described by case law as non-aggravated offenses. By doing so, the legislature made aggravated state jail felonies punishable under the provisions of section 12.35(c) subject to the habitual criminal provisions of section 12.42(d).
>
> 136 S.W.3d 355, 363 (Tex. App.—Austin 2004, pet. ref'd). *Id.* at 15.

Bunton was decided following the 1996 amendments to §12.42, but before the changes—including the creation of §12.425—

enacted in 2011. The majority also cited two other courts of appeal that had found similarly. *Id.* The court's decision in *Smith v. State* was based on the statute as it was revised effective September 1994, before either the 1996 or the 2011 revisions to §12.42. 960 S.W.2d 372, 375 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). *Lopez v. State* was decided following the 1996 amendments, but before the 2011 legislation. 1999 Tex. App. LEXIS 6722 (Tex. App.—Houston [1st Dist.] Sept. 2, 1999, pet ref'd.) (mem. op., not designated for publication). The same is true for W*ashington v. State*, 326 S.W.3d 302, 315 (Tex. App.—Fort Worth 2010, pet. ref'd).

As the court of appeals' opinion demonstrates, the legislature's intent cannot be clearly and unambiguously discerned from only the literal text of the statutes, making the punishment enhancement scheme for state jail felonies ambiguous.

V. Extratextual Factors

A. Establishment of state jail felonies & §12.42(d) amendment – 1993

Senate Bill 1067 was intended to "revise the law so that violent offenders would serve dramatically higher proportions of their prison sentences, nonviolent offenders would be punished

more economically and effectively, and the jail backlog would be addressed." *State v. Warner*, 915 S.W.2d 873, 876 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd.), *citing* Texas Punishment Standards Commission, Final Bill Analysis, Tex. S.B. 1067, 73rd Leg., R.S. 1 (1993).

The bill was filed at a time when prisons were subject to lawsuit-driven population caps and could not accept inmates. *Warner* at 876. County jails became overcrowded. Some prisoners who were released on early parole committed highly publicized violent crimes. *Id.*

§12.35 created state jail felonies for low-level offenses, divided into two categories. "Regular" state jail felonies under §12.35(a) were to be punished by 180 days to two years confinement in a state jail facility, but suspension of the sentence was mandatory. *See* former TEX. CODE CRIM. PROC. Art. 42.12, 15(d) (Vernon Supp. 1995). "Aggravated" state jail felonies under §12.35(c) were punished as a third-degree felony. *Id.* at 877; TEX. PENAL CODE §12.35 (Vernon 1994).

At the same time that state jail felonies were created, the provisions for repeat and habitual offenders, §12.42(d), was

amended. The text was changed from, "if it be shown on the trial of *any* felony offense…" to "if it is shown on the trial of *a* felony offense…" *Warner* at 877, *citing* Act approved June 19, 1993, 73rd Leg., R.S., ch. 900, 12.42, 1993 Tex. Gen. Laws 3586, 3604. (emphasis in opinion).

The *Warner* court found that sufficient ambiguity existed—the state argued that "a felony" in §12.42(d) included state jail felonies, while Appellant disagreed—to justify consideration of extratextual factors. *Id.* at 875, n.2. In addition to noting the circumstances under which the statute was enacted, the objective of the statute, and former versions of §12.42, the court took note of several points of legislative history. First, the earliest version of Senate Bill 1067 contained a provision to enhance state jail felonies to third degree felonies based on two prior felony convictions, as well as a later proposed amendment to do the same. *Id.* at 876. This provision did not make it into the final bill. Next, John Bradley, Assistant District Attorney for Williamson County testified at the Senate Criminal Justice Committee hearing that "criminal history alone could not be used to 'graduate' out of the state jail felony punishment scheme." *Id.*, citing Hearing on Tex. S.B. 1067 before

the Senate Criminal Justice committee, 73rd Leg., R.S. (April 14, 1993) (tapes available from Senate Staff Services Office). Lastly, during a full Senate hearing, John Whitmire, the author of the bill was asked what the effect would be if a defendant with two prior felony convictions committed a state jail felony. Mr. Whitmire responded that "unless the state jail felony was committed with a weapon or the person had committed a "3g" offense previously, he will remain a candidate for the state jail." *Id*.

In examining §12.42, *Warner* court noted that state jail felonies were only expressly mentioned in subsections (a) and (e). *Id*. at 877. Subsection (a) provided, "if it is shown on the trial of a state jail felony punishable under section 12.35(c) [aggravated state jail felony] or on the trial of a third-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony." TEX. PENAL CODE 12.42(a) (Vernon 1994).

Subsection (e) provided, "[a] previous conviction for a state jail felony may be used for enhancement purposes under this section only if the defendant was punished for the offense under Section 12.35(c) [aggravated state jail felony]." *Id*.

Applying the rules of statutory construction, the court of appeals concluded that the legislature did not intend for state jail felonies, even aggravated ones, to be enhanced to habitual offender status pursuant to section 12.42(d). *Id.* at 879. *See also*, *Mancuso,* 919 S.W.2d 86 (only state jail felonies under 12.35(c) may be enhanced—but only to second degree felonies under 12.42(a)); *Gonzalez v. State*, 915 S.W.2d 170, 175 (Tex. App.—Amarillo 1996, no pet.) ("applying section 12.42(d) of the Code to the punishing of state jail felons with prior, non-state jail felony convictions would be contrary to the intent of the Legislature;") *Wilkerson v. State*, 927 S.W.2d 112,115 (Tex. App.—Houston [1st Dist.] 1996, no pet.)(state jail felonies, even when enhanced with prior convictions, could not be punished under the habitual offender provision); *Ex parte Beck*, 922 S.W.2d 181 (Tex. Crim. App. 1996) (in 1995, state jail felonies could not be enhanced under section 12.42(d) of the Code).

State v. Smith appears to be the first case under the law as it existed from September 1994 to January 1996 to specifically hold that aggravated state jail felonies may be enhanced to habitual offender status under §12.42 , ignoring *Mancuso* and *Beck*, and overruling its own prior opinion in *Warner* , *supra*. *Smith,* 960

S.W.2d 372 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). At least one court criticized *Smith. See Horn v. State*, NO. 07-98-0065-CR, 1998 Tex. App. LEXIS 7898 (Tex. App.—Amarillo Dec. 21, 1998, pet. ref'd) (not designated for publication).

B. §12.42 Amendments - 1996

Senate Bill 15, Acts 1995, 74th Leg., ch. 318 (S.B. 15), § 1, effective January 1, 1996 , added two provisions to 12.42(a) for enhancing the punishment of 12.35(a) state jail felonies. Two prior state jail felony convictions would result in punishment as a third-degree felony, while two prior, sequential non-state jail felonies would be punished as a second-degree felony. *Id*. This bill also amended subsection (d): "If it is shown on the trial of a felony offense *other than a state jail felony punishable under section 12.35(a)...*" *Id*. (emphasis added to indicate revision). Finally, subsection (e), which had permitted enhancement with a state jail felony conviction under 12.35(c), was revised to instead state what was not permitted: a state jail conviction under 12.35(a) to enhance an offense under subsections (b), (c) or (d). This was an early indication that it was important to the legislature to maintain the low-level punishment intended for state jail offenses.

In an early bill analysis of SB 15 by the House Research Organization, it was noted that the revisions were necessary to correct implementation problems identified by practitioners, and to correct inadvertent mistakes made in the 1993 rewrite of the Penal Code. *See* House Research Organization, Bill Analysis, Tex. S.B. 15, 74th Leg., R.S. 1 (5/22/1995).

This same analysis again shows that the legislators were focused on the enhancements for 12.35(a) state jail felonies. The only time 12.35(c) was mentioned was to indicate its exclusion:

> CSSB 15 would make changes in the enhancement of punishments for state jail felons. If on conviction of a state jail felony *in which the punishment is not automatically enhanced to that for a third-degree felony* [under 12.25(c)] (emphasis added), the offender: has previously been convicted of two state jail felonies, punishment would be for a state jail felony *or* a third-degree felony. (emphasis in original); has previously been convicted of two felonies other than unenhanced state jail felonies, punishment would that (sic) imposed for a state jail felony; has previously been convicted of three felonies, punishment would be life in prison or a term of 25 years to 99 years.
>
> Senate Bill [CSSB] 15 would exclude persons whose current offense is a state jail felony from the current enhancement to life in prison or a term of 25 years to 99 years for persons convicted of a felony and who have two previous felony convictions that followed each other. *Id.* at 3-4.

In the side-by-side comparison between the senate and house versions, the senate makes no mention of habitual punishment, while the house indicated a desire to retain the habitual offender punishment range for enhancement of *non-state jail felonies* with two prior, sequential non-state jail felony final convictions. There was no mention of including aggravated state jail felonies or excluding regular state jail felonies. Yet, the final version by committee did specify that state jail felonies punishable under 12.35(a) were not subject to enhancement under 12.42(d).

There is nothing in the history to indicate that the legislature ever had the specific intent to include trials of 12.35(c) state jail felonies in the felonies subject to 12.42(d) enhancement. But because of the focus on 12.35(a), and their specific exclusion, most courts held that the legislature intended inclusion of aggravated state jail felonies.

In one of the cases cited by the court of appeals in this case, *Lopez v. State* , the court explained:

> There are two classes of state jail felonies: (1) nonaggravated, i.e., those punishable under section 12.35(a), and (2) aggravated, i.e., those punishable under section 12.35(c). When a defendant is punished for a nonaggravated state jail felony, even if it is an enhanced

> state jail felony, the punishment range cannot be further enhanced to the range for an habitual offender. See State v. Webb, 980 S.W.2d 924, 927 (Tex. App.--Fort Worth 1998, pet. ref'd). When a defendant is punished for an aggravated state jail felony, however, the punishment range may be enhanced to the range for an habitual offender, a term no less than 25 years, so long as the statutory prerequisites for such an enhancement are met. Smith v. State, 960 S.W.2d 372, 375 (Tex. App.--Houston [1st Dist.] 1998, pet. ref'd). A defendant meets these prerequisites if he (1) is tried for a felony offense "other than a state jail felony punishable under Section 12.35(a)," and (2) has been convicted of two previous felony offenses, the second of which occurred after the first conviction was final. Lopez v. State , 1999 Tex. App. LEXIS 6722 (not designated for publication), citing TEX. PENAL CODE ANN. § 12.42(d); Smith, 960 S.W.2d at 375.

Importantly, just prior to the latest revisions, in February 2011, this Court issued a unanimous opinion in *Ford v. State*, 334 S.W.3d 230 (Tex. Crim. App. 2011). Ford was convicted of failing to register as a sex offender, a third-degree felony. TEX. CODE CRIM. PROC. 62.102. Based on a prior conviction for the same offense, the offense level was elevated from a third-degree felony to a second-degree felony. The punishment for the second-degree offense was then enhanced to that of a first-degree felony under TEX. PENAL CODE 12.42(b) by a prior conviction for arson. On appeal, Ford argued that 62.102 only increased the punishment—not the level of offense; therefore, the punishment could not be further enhanced

under 12.42. The Court of Appeals disagreed and affirmed the conviction. *Id.* at 231; *Ford v. State*, 313 S.W.3d 434, 442 (Tex. App—Waco 2010).

This Court reversed the Court of Appeals, finding that it had relied on erroneous dicta from two Court of Criminal Appeals' cases. *Id.*, *citing State v. Webb*, 12 S.W.3d 808, 811-12 (Tex. Crim. App. 2000); and *Young v. State*, 14 S.W.3d 748, 751-52 (Tex. Crim. App. 2000). In *Webb*, the Court had "opined" that aggravated state jail felonies could be further enhanced, stating, "Thus the legislature has explicitly provided for certain forms of 'multiple enhancements' of state jail felonies (i.e. enhancement of both offense and punishment)…*Ford*, 334 S.W.3d 230 , 233, *citing Webb* at 811.

With particular relevance to the instant case, the Court noted its error:

> In *Webb*, we erred to imply that Penal Code Section 12.35(c) increases the offense level. Section 12.35(c) uses the language "shall be punished," the same language in Penal Code Section 12.42, which we made clear in *Webb* increases the punishment level only. When applicable, Section 12.35(c) increases the punishment level for a 12.35(a) state jail felony to a third-degree felony, but the primary offense itself remains a state jail felony.
>
> *Ford*, 334 S.W.3d 230, 234.

After 1996, there had been no further changes to §12.42 until House Bill 3384 was enacted, effective September 1, 2011. It is this version that governs the instant case.

C. Amendments to §12.42 and Creation of §12.425 – 2011

The 82nd Legislature not only made changes to §12.42 but created a separate section for the enhancement of state jail felonies, section §12.425: PENALTIES FOR REPEAT AND HABITUAL FELONY OFFENDERS ON TRIAL FOR STATE JAIL FELONY. See Act of May 25, 2011, 82nd Leg. R.S., ch.834, § § 1, 2, 5, 2011 Tex. Gen. Laws 2104, 2104-05.

This bill removed all references to state jail felony enhancements from §12.42 and installed them in the newly-created §12.425. The only remaining mention of state jail felonies in §12.42 is the strict prohibition on using §12.35(a) convictions to enhance other felonies, or to provide the base level offense for enhancement by other felonies.

The unmistakable intent of the legislature throughout this statute's history is that state jail felonies remain low-level felonies. Even aggravated state jail felonies were [and still are] punished only

one level above state jail felony punishment. In keeping with that intent, the focus of the amendments to §12.42 has been to clarify that state jail felonies punishable under 12.35(a) not be subject to habitual enhancement, and not to be used to enhance non-state jail felonies. *See Samaripas v. State*, 454 S.W.3d 1*10; 2014 Tex. Crim. App. LEXIS 1559, **22, Keller, C.J., dissenting ("When 12.42(e) was first enacted in 1994, it provided unambiguously that only aggravated state jail felonies, under 12.35(c) could be used for enhancement under 12.42).

Indeed, HB 3384 was drafted to further that intent. In the Senate Research Center's Bill Analysis of May 19, 2011, the authors noted that state jail felonies were created to keep state prison beds available for "the most dangerous felons."

Despite this goal, the amendments over the years had created increased punishment of state jail felonies almost equal to that of non-state jail felonies. The authors noted that legislation was needed to clarify that prior convictions for "felonies" did not include convictions for state jail felonies under 12.35(a). The stated intent of HB 3384 was to "remain true to the intent of the legislature when it created the lower-level category of state felony offenses and to retain

the special treatment given to state jail offenses punishable as aggravated state jail felonies."

Thus, after removing state jail references, the legislature renamed section 12.42 to indicate that it applied to first-, second- and third-degree offenses, while section 12.425's title signaled application to state jail felonies only. The court of appeals in *Terrell v. State*, No. 01-14-00746-CR, 2016 Tex. App. LEXUS 8875 (Tex. App. – Houston [1st] Aug. 16, 2016, no pet.)(not designated for publication) noted that titles may aid in statutory construction, but since the court found no ambiguity, these titles could not limit what the court believed to be the plain text of §12.42 —authorizing enhancement under (d) for any conviction other than a state jail felony under 12.35(a). *Id.* at *16-*17, citing *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 1392, 91 L. Ed. 1646 (1947).

Having found ambiguity in the state jail punishment scheme here, the titles in the instant case do shed light on what the legislature intended and allow analysis within the context of the entire statutory scheme. Certainly, the legislature expected that using a specific, limiting title, such as "on trial for…" would direct a

practitioner or researcher to the appropriate section based on whether the defendant was being tried for a state jail felony, or one of the non-state jail felonies. There is nothing in the text of 12.425 that would hint that there were more serious punishment provisions for the 12.35(c) defendant lurking in a separate statute entitled, PENALTIES FOR REPEAT AND HABITUAL FELONY OFFENDERS ON TRIAL FOR FIRST, SECOND, OR THIRD DEGREE FELONY, particularly since the 12.35(c) offense remains a state jail felony. See *Ford v. State*, supra. Furthermore, the more specific state jail felony punishment statute is to be given more effect in determining state jail felony enhancement over the more general statute for other felonies. *See* TEX. GOV'T. CODE §311.026 .

Finally, the rule of lenity may be considered if a statute or statutory scheme is ambiguous. *Cuellar v. State*, 70 S.W.3d 815, 819, n.6 (Tex. Crim. App. 2002). "[B]efore a man can be punished, his case must be plainly and unmistakably within the statute, *and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. Id.*, quoting *Murray v. State*, 21 Tex. Ct. App. 620, 633, 2 S.W. 757, 761 (1886) (emphasis in original).

It is not plain nor unmistakable that the legislature intended to "silently"[9] leave one provision, indeed the harshest one, remaining in the statute from which it just removed every other relevant provision. Thus, for punishment enhancement purposes, this Court should find that Appellee's state jail felony case is governed by sections 12.35 and 12.425 of the Texas Penal Code.

[9] *Kahookele, Slip. Op.*, Kelly, J. dissenting in part at 2.

PRAYER

Appellee Edmund Koko Kahookele prays that this Honorable Court reverse the Third Court of Appeals' judgment and remand for further proceedings consistent with this opinion.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that, according to Microsoft Word's word count tool, this document contains 6085 words.

/s/ Susan Schoon

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of Appellee's Brief was served on the District Attorney, Comal County, Texas and the State Prosecuting Attorney on this the 4th day of January 2021 by efile service.

/s/ Susan Schoon

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